Supreme Court, U.S.
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No. 03-59

IN THE

Supreme Court of the United States

BAXTER INTERNATIONAL, INCORPORATED,

Petitioner,

v.

ABBOTT LABORATORIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in ruling that petitioner was not entitled to relitigate in federal court an issue of federal antitrust law that petitioner submitted for resolution to an arbitration tribunal and which that tribunal then decided.

CORPORATE DISCLOSURE STATEMENT

Respondent Abbott Laboratories has no parent company, and no publicly held corporation owns 10% or more of respondent's stock.

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BRIEF IN OPPOSITION

STATEMENT

Petitioner Baxter International, Incorporated ("Baxter") submitted for an arbitration tribunal's resolution an affirmative defense (to a breach of contract claim) that Baxter contended arose under federal antitrust law, which both the arbitration tribunal and the district court below concluded lacked any merit. The court of appeals affirmed on the ground

that petitioner should not be allowed to relitigate in federal court an issue of federal law that petitioner submitted to the arbitration tribunal and that the tribunal actually decided. The court of appeals reasoned that permitting relitigation in such an instance would violate the parties' agreement to arbitrate and the arbitrators' determination of such issues. Seeing no violation of the antitrust laws, the court of appeals further found that enforcement of the resulting arbitration award is not contrary to public policy.

Because the court of appeals' decision is correct, is entirely in accord with this Court's precedent, and does not conflict with any decision of any other federal court of appeals, further review is not warranted.

A. The Sevoflurane Agreements

Baxter developed sevoflurane, an inhalation anesthetic, as well as a one-step process for its creation. Baxter obtained both a product patent for sevoflurane, since expired, and process patents for the one-step process, the last of which is due to expire in December 2005. Pet. App. 1a, 19a-20a.

In 1998, Baxter decided not to pursue commercialization of the product, so it granted to Maruishi Pharmaceutical Co., Ltd. ("Maruishi"), a Japanese company, an exclusive worldwide license to practice Baxter's sevoflurane patented process. Maruishi successfully developed sevoflurane in Japan, but did not have the capability to do so elsewhere. It sought out, with Baxter's consent, other potential sublicensees to commercialize the product outside Japan. Maruishi, again with Baxter's consent, determined that respondent Abbott Laboratories ("Abbott") presented the best chance for expanded commercialization of the product. Pet. App. 1a-2a, 19a-20a.

To that end, Baxter, Maruishi, Abbott, and another Japanese company, Central Glass Co., Ltd. ("Central Glass"), entered into a series of detailed agreements in 1992. These agreements provided that Baxter would license its sevoflurane patents to Maruishi, Maruishi would sublicense these patents to Abbott, Central Glass would manufacture sevoflurane for exclusive sale to Maruishi for resale exclusively to Abbott, Abbott would seek to commercialize sevoflurane in the United States (and elsewhere), and Abbott would pay royalties on sales of sevoflurane (through Maruishi) to Baxter. At the same time, the parties entered into a Dispute Resolution Agreement, which included detailed provisions for the resolution of disputes under the other agreements (and separately prohibited impairment of the Original Commercial Relationship among the parties), culminating in "final and binding" arbitration. Pet. App. 2a, 23a-24a.

Abbott began the task of gaining FDA approval for sevoflurane in 1992, but approval was not granted until 1995. After FDA approval was obtained, Abbott began to commercialize sevoflurane in the United States. This product had not previously been available to those in need of anesthetics in the United States. Between 1992 and 2000, Abbott expended $1.434 billion to commercialize sevoflurane. Baxter has received tens of millions of dollars in royalties from Abbott on sales of sevoflurane. Pet. App. 2a-3a, 26a.

The four-way agreements among the parties functioned well until 1998, when Baxter acquired, for approximately $94 million, certain assets of a company (Ohmeda) that had developed a three-step process for making a generic sevoflurane. Baxter did not notify the other parties of its intent to acquire Ohmeda. Thereafter, Baxter announced its plans to compete with its own licensee and sublicensee by selling Ohmeda generic sevoflurane in the United States. Had Baxter not acquired

Ohmeda, there would be no arbitration or the resultant appeals since Ohmeda was otherwise prepared to seek FDA approval of its generic sevoflurane and had constructed its own manufacturing plant in Puerto Rico. Abbott demanded binding arbitration, pursuant to the Dispute Resolution Agreement, of its claim that Baxter would violate both the Baxter/Maruishi Agreement and the Dispute Resolution Agreement if it sold generic sevoflurane in competition with its own sublicensee before the December 2005 expiration of the 1992 sevoflurane agreements. Pet. App. 2a-3a, 26a-27a.

B. Proceedings Below

1. The arbitration tribunal ordered Baxter not to sell or market sevoflurane in the territory defined in the Maruishi/Abbott Agreement until the expiration of that agreement in December 2005. Pet. App. 43a-68a. The tribunal concluded that Baxter's action constituted both a breach of its duty of good faith under the Baxter/Maruishi Agreement (under which Abbott had a right to sue as a third party beneficiary) and an impairment of the Original Commercial Relationship among the parties under the Dispute Resolution Agreement, entitling Abbott to relief under both Agreements.[1] *Id.* at 65a. Baxter does not appeal from either of those rulings here.

During the arbitration proceedings, Baxter defended against Abbott's claim by, among other things, presenting

1. Petitioner incorrectly asserts (Pet. 7 n.1) that the court of appeals erred "when it stated Baxter's sale of generic sevoflurane would violate the Baxter-Maruishi license." According to petitioner, the arbitration tribunal did not find a breach of that licensing agreement, but instead relied exclusively on the Dispute Resolution Agreement. Petitioner is in error. As the award makes plain, the tribunal concluded that "the obligation of good faith under Illinois law in this case establishes an independent cause of action under the Baxter/Maruishi Agreement" and that Baxter breached that duty (along with the Original Commercial Relationship). Pet. App. 65a.

affirmative defenses that Abbott's requested relief would result in a violation of section 1 of the Sherman Act, as well as a consent decree between the FTC and Abbott. *Id.* at 66a. The tribunal concluded that "no illegality results from the interpretation of the Sevoflurane Agreements in this award." *Id.* The tribunal found that Baxter's antitrust issues "do not arise from those Agreements themselves" but are instead "a result of Baxter's acquisition of Ohmeda . . . which removed from the Sevoflurane market the very type of independent generic competitor foreseen by the Parties in 1992." *Id.* at 67a.[2]

2. The district court confirmed the arbitration award. Pet. App. 19a-42a. The court rejected Baxter's contention that the arbitration "tribunal's interpretation of the Sevoflurane Agreements is a market allocation agreement and thus is a *per se* violation of section 1 of the Sherman Act." *Id.* at 31a. The court agreed with the tribunal that Baxter's claim lacked merit because "the only adverse impact on competition was due to the actions of Baxter and not the tribunal's interpretation of the Sevoflurane Agreements." *Id.* at 34a.

The court found that "there is no evidence in the record as to the parties' intent to divide the market or minimize competition" and that "[t]he record is silent with respect to Abbott's harm to generic competition." *Id.* at 34a. "There were no facts presented to the arbitrators to support any type of market allocation." *Id.* at 35a. The court stressed that "the injury now alleged by Baxter is not your typical type of antitrust injury" because "Baxter, who profits tremendously

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2. One arbitrator dissented from the award on grounds unrelated to Baxter's affirmative defenses. Pet. App. 69a-91a.

from its contractual arrangement with Abbott, wants to increase its profits by introducing generic sevoflurane, thus establishing its presence in the generic submarket as well as the existing sevoflurane market which Baxter currently profits from." *Id.* at 34a.

The district court also rejected Baxter's alternative contentions that the arbitration tribunal's decision created an unlawful "ancillary covenant not to compete" or a Sherman Act Section 1 violation "under a rule of reason analysis." Pet. App. 35a-38a. With regard to the former, the court found no such unlawful covenant because "Baxter is free to sell other inhaled anesthetics and admits to the sale," "there is no allegation that the agreement between Abbott and Baxter was created to raise the price of sevoflurane," and "Baxter has not established that generic competition is not still possible." *Id.* at 36a, 37a. With regard to the last, the court concluded that, judging the effects of the licensing arrangement as of the time the contract was entered into, "the licensing arrangement was pro-competitive." *Id.* at 39a.[3]

3. The court of appeals affirmed. Pet. App. 1a-7a. The court held that Baxter is not "entitled to reargue an issue that was resolved by the arbitral tribunal" because "a mistake of law is not a ground on which to set aside an award." *Id.* at 4a. Relying on this Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) "that international arbitration of antitrust disputes is appropriate[,]" the appellate tribunal reasoned that "*Mitsubishi* did not contemplate that, once arbitration was

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3. The district court also rejected Baxter's claims that the tribunal's award required Abbott to violate a FTC consent decree or contravened Illinois public policy. Pet. App. 39a-42a.

over, the federal courts would throw the result in the waste basket and litigate the antitrust issues anew." Pet. App. 5a.

The court did not question Baxter's assertion "that arbitrators are not allowed to command the parties to violate rules of positive law[,]" explaining instead that "*whether* the tribunal's construction of the Baxter-Maruishi agreement has that effect was a question put to, and resolved by, the arbitrators. They answered no, and as between Baxter and Abbott their answer is conclusive." Pet. App. 5a-6a (emphasis in original).

Finally, the court separately set forth several reasons why treating Baxter as bound by the arbitration tribunal's conclusion does not violate "public policy." First, the appellate court recognized that the exclusivity rule of the licensing agreement "was a lawful ancillary agreement designed to induce Maruishi and its sublicensees to make the investments needed to bring the new drug to market." Pet. App. 6a-7a. Second, the tribunal's award "does not condemn the public to tolerate a monopoly" because, if the arrangement "really does offend the Sherman Act, then the United States, the FTC, or any other purchaser of sevoflurane is free to sue and obtain relief." *Id.* at 6a. The arbitration award bars only Baxter from relitigating the issue, and "Baxter, as a producer, is a poor champion of consumers." *Id.* at 6a. Third, "if there is an antitrust problem, it lies in the acquisition — and the remedy would be [Baxter's] divestiture of the Ohmeda process patent . . . Baxter, which can solve unilaterally any antitrust problem, is in no position to insist that the burden of the solution fall on Abbott by depriving it of the benefit of the exclusive Baxter-Maruishi license." *Id.* at 7a.[4]

4. One judge dissented from the court of appeals' ruling (Pet. App. 8a-18a), and three judges dissented from the court's denial of rehearing *en banc*. *Id.* at 92a-94a.

REASONS FOR DENYING THE PETITION

Petitioner misstates the ruling of the court of appeals below. The court of appeals' ruling was entirely grounded in the particular facts of this case (factual determinations that were both fatal to Baxter's theory and exclusively within the province of the arbitral panel) and correct.

Contrary to the premise underlying petitioner's "Question Presented" (Pet. i), the court of appeals did *not* rule that "an arbitration panel may shield its award from court review for compliance with public policy." The court below did *not* hold that courts are wholly powerless to refuse to enforce arbitration rulings on the ground that they are void for public policy.

The court of appeals instead based its ruling that the particular arbitration award challenged in this case should not be disturbed upon the presence of at least three specific circumstances: (1) the arbitration tribunal plainly had jurisdiction to address petitioner's antitrust affirmative defense, and petitioner expressly invited the tribunal to do so; (2) the arbitration tribunal actually decided that legal issue (which, by definition, was embedded in the tribunal's findings of fact), and petitioner is not entitled to relitigate an affirmative defense that was resolved by the arbitration tribunal, because a mistake of law is not a ground on which to set aside an arbitration award; and (3) the case presents no judicial occasion to refuse to enforce the arbitration award on "public policy" grounds because no antitrust problem appeared from the record.

No further review is warranted. The court of appeals' decision is correct, is entirely consistent with decisions of this Court, and does not conflict with the rulings of any other federal circuit. The petition, accordingly, should be denied.

1. The court of appeals correctly declined to allow petitioner to relitigate the antitrust affirmative defense, which the district court also rejected on the merits. The arbitration tribunal considered and addressed the antitrust defense that petitioner then sought to raise anew in court, and indeed the tribunal did so at petitioner's own express invitation. In any event, legal errors in the determination of an arbitration tribunal do not provide a ground upon which to set aside an award.

As this Court previously recognized, the Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, which is the subject of domestic implementing legislation (*see* 9 U.S.C. §§ 201-208), expressly sets forth the grounds for refusing to enforce an international arbitration award. Not surprisingly, a legal error is not one of them. Arbitrators have "free rein to decide the law as well as the facts and are not subject to appellate review." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968); *see United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). "[P]lenary review by a court of the merits would make meaningless the provisions [of the contract] that the arbitrator's decision is final." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). Of course, were the rule otherwise, the principal advantage presented by arbitration — avoidance of the time and expense of protracted judicial proceedings — would be eviscerated.

Nor is there any ground for petitioner's implicit suggestion that antitrust law should be treated differently. This Court has already considered and rejected just that contention. In *Mitsubishi*, the Court "decline[d] to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so." 473 U.S. at 639 n.21.

Finally, petitioner's proffered distinction (Pet. 12) between this arbitration tribunal's *resolution* of an antitrust issue and the arbitration award's *creation* of such an issue is wholly illusory. Here, at petitioner's own invitation, one issue presented to the arbitration tribunal was whether the arbitration award would create an antitrust problem. As the court of appeals explained, "*whether* the tribunal's construction of the Baxter-Maruishi agreement has that effect was put to, and resolved by, the arbitrators. They answered no, and as between Baxter and Abbott their answer is conclusive." Pet. App. 6a (emphasis in original).

2. Contrary to petitioner's claim (Pet. 11-12), the court of appeals below in no manner intimated that federal courts cannot decline to enforce an arbitration award on the ground that it is against public policy. Nor is the effect of the court's ruling that arbitration tribunals may "shield" their awards from such public policy review by simply deciding the public policy issue themselves. Petitioner's accusation (Pet. 19-23) that the court of appeals' ruling "threatens effectively to nullify the public policy exception to enforcement of arbitral awards" is misdirected.

Petitioner falsely equates a court's properly declining to revisit a legal issue resolved by the arbitration tribunal with

a court's improperly eschewing its residual judicial authority to refuse to enforce an arbitration award in those extreme circumstances where the award's enforcement would offend public policy. The court of appeals distinguished between the two judicial functions in this case and addressed each in a wholly appropriate fashion.

The appellate court considered whether it had the authority to relitigate an issue of federal antitrust law that the arbitration tribunal had, at petitioner's own invitation, actually decided. The court correctly ruled that it had no such authority. Pet. App. 4a-6a. The appellate court also considered whether enforcement of the arbitration award would lead to a violation of law and concluded that it would not. Pet. App. 6a-7a.

The court of appeals dismissed petitioner's contention that the arbitral award required the parties to violate the antitrust laws, stating that the exclusivity rule of the licensing agreement "was a lawful ancillary agreement" designed to induce investments in a new drug product. Pet. App. 6a-7a.[5] The appellate court also determined that, even if there was an antitrust issue, holding that petitioner was bound by the outcome of the arbitration was not unjust, because any such

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5. "The Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to legitimate transactions." *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689 (1978). Courts reviewing arbitral awards for possible violations of public policy defer to the arbitrators' findings of fact. *Misco*, 484 U.S. at 45. Here, the tribunal's factfinding makes clear that the co-terminous non-compete in the licensing agreement does not violate the antitrust laws under the Rule of Reason, even if petitioner could demonstrate the requisite antitrust injury under § 4 of the Clayton Act. *See* Pet. App. 66a-67a.

problem was created by petitioner's acquisition of Ohmeda and, therefore, could be as easily solved unilaterally by petitioner's divestiture of Ohmeda. *Id.* at 7a. The court of appeals concluded that precluding petitioner from challenging the arbitral award as being violative of the antitrust laws "does not condemn the public to tolerate a monopoly," because other private parties or governmental authorities may bring an antitrust enforcement action. *Id.* at 6a. There is simply no merit to petitioner's contention that the court of appeals declined to consider petitioner's public policy argument.

3. Moreover, this case presents none of the sweeping questions of law and public policy implications set forth in the petition. Petitioner's claims of conflicts with this Court's precedent and with other circuits' rulings all lack merit.

For instance, petitioner's reliance on *Mitsubishi* and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) is misplaced. As described by the court of appeals in this case, the *Mitsubishi* Court anticipated the circumstances presented here, where the arbitration tribunal resolved a federal antitrust issue. In such circumstances, the federal judicial role is confined "'to ascertain[ing] that the tribunal took cognizance of the antitrust claims and actually decided them.'" Pet. App. 6a, *quoting* 473 U.S. at 638. That is precisely what the court of appeals did in this case. *See* Pet. App. 6a ("Ensuring this is as far as our review legitimately goes."). While *Mitsubishi* and *Vimar* discussed the distinct circumstance, not presented here, of federal judicial review in the event that an arbitral award constituted a waiver of statutory remedies (*see Vimar*, 515 U.S. at 540, *quoting Mitsubishi*, 473 U.S. at 637 n.19), the Court never suggested that federal courts, under the guise of public policy

review, should allow parties to an arbitration to relitigate issues already submitted to and resolved by the arbitration tribunal.

The other cases upon which petitioner relies are inapposite, because in those cases, unlike here, the arbitrators were not authorized to, and did not, decide the issues later presented to the courts. *See, e.g.*, Pet. 14 (analysis of *W.R. Grace & Co. v. United Rubber Workers Local 759*, 461 U.S. 757 (1983)). In those cases, the issue decided in arbitration was whether disciplining an employee violated a "just cause" provision in the labor agreement (see Pet. 17), whereas the issue presented to the court was whether the reinstatement of the disciplined employee would violate a public policy established by statutes or regulations that were separate and distinct from the labor agreement. Here, by contrast, the antitrust defense that petitioner has argued before the courts is the same issue on which petitioner failed to carry the burden of proof before the arbitration tribunal.[6]

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6. Nowhere in *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57, 62 (2000) is it even hinted that the arbitrator decided whether the employer's action comported with the federal regulations in question. Contrary to petitioner's implication (see Pet. 16-17), cases from other circuits are no different. There, the arbitrators' decisions were based upon the collective bargaining agreements, while the courts' decisions were based upon statutes, regulations, and precedents that the arbitrators were not asked to (and lacked the authority to) interpret. *See, e.g.*, *International Brotherhood of Electrical Workers, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 710 (2d Cir. 1998) (issue before arbitrators was "whether the just cause standard specified in Article XXII of the collective bargaining agreement was met") and at 719 n.13 ("The Panel was not asked to discuss, let alone resolve, the public policy implications of reinstating [the employee]").

This Court has emphasized the importance of this distinction by making clear that the scope of the parties' agreement to arbitrate is dispositive of such issues:

> [A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute. . . . But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995). The reason why courts "do not sit to hear claims of factual or legal error by an arbitrator" is "[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge . . . ." *Misco*, 484 U.S. at 37-38. As *Mitsubishi* made clear, these principles apply to the arbitration of disputes involving statutory as well as contractual issues. "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) (quotation omitted). Petitioner presented its antitrust affirmative defense in arbitration, and it is bound by the arbitrators' decision. It is not entitled to relitigate this issue in court by recasting it as a public policy question.

4. Finally, this case would in all events be an especially poor vehicle to address the legal issue set forth in the petition. First, this case is not an instance where the court of appeals reversed a district court's ruling that petitioner's antitrust affirmative defense had merit. To the contrary, the court of

appeals recognized that the prohibition of a licensor competing against its own sublicensee only during the term of the licensing agreement "was a lawful ancillary agreement designed to induce Maruishi and its sublicensees to make the investments needed to bring the new drug to market." Pet. App. 6a-7a. There is little reason to believe that, were this Court to accept petitioner's invitation to prolong this litigation, the end result would be any different given the fact-driven nature of petitioner's affirmative defense — heard and rejected by the arbitral panel.[7]

Second, as described by the court below, petitioner, "as a producer, is a poor champion of consumers." Pet. App. 6a. Petitioner for years enjoyed the benefits of the agreement that it negotiated, which has and continues to entitle it to royalties based on respondent's sales. But now that petitioner has concluded that it can make higher profits by competing against its own sublicensee (which expended $1.434 billion to commercialize the product in the first place), it seeks to avoid its prior agreement. Pet. App. 3a. Moreover, as the court of appeals noted, having created any arguable antitrust issue by acquiring Ohmeda, petitioner "can solve unilaterally any antitrust problem" by divesting itself of Ohmeda and cannot use this self-created issue to attempt to deprive respondent of the benefits of its agreement. Pet. App. 7a. Similarly, in *W.R. Grace*, this Court rejected the employer's public policy defense because the purported violation of law "was of the Company's own making" (461 U.S. at 767) and because there was no justification to shift the burden of loss from the employer

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7. As the district court concluded (Pet. App. 39a-40a), petitioner's "FTC consent decree" affirmative defense likewise is meritless, because Baxter (as a non-party) lacks standing to enforce this decree (*Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975)), and because this licensing arrangement is simply not contrary to the language of the decree in any event.

to certain of its employees, "who shared no responsibility for" the asserted illegality (*id.* at 770). Finally, as the court of appeals pointed out, others with more genuine concern for the public welfare can seek redress for the supposed antitrust issue raised by petitioner. Pet. App. 6a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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